



FR-4915-01-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35667]

Arkansas-Oklahoma Railroad, Inc.—Lease and Operation Exemption—Lines of Union Pacific Railroad Company

Under 49 CFR 1011.7(a)(2)(x)(A), the Director of the Office of Proceedings (Director) is delegated the authority to determine whether to issue notices of exemption under 49 U.S.C. 10502 for lease and operation transactions under 49 U.S.C. 10902.

However, the Board reserves to itself the consideration and disposition of all matters involving issues of general transportation importance. 49 CFR 1011.2(a)(6).

Accordingly, the Board revokes the delegation to the Director with respect to issuance of the notice of exemption for lease and operation of the rail lines at issue in this case. The Board determines that this notice of exemption should be issued, and does so here.

According to Arkansas-Oklahoma Railroad, Inc. (AOK), a Class III rail carrier, AOK and Union Pacific Railroad Company (UP) have entered into a new Lease Agreement (Agreement). AOK has filed a verified notice of exemption under 49 CFR 1150.41<sup>1</sup> to continue to lease from UP and to operate approximately 12.58 miles of UP's rail lines between (1) milepost 364.96 and milepost 370.5 on UP's Shawnee Branch at or near McAlester, a distance of approximately 5.54 miles, and (2) the Krebs Industrial Lead from the clearance point of the mainline switch on UP's Cherokee Subdivision at

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<sup>1</sup> AOK originally filed its verified notice of exemption on September 25, 2012. On October 19, 2012, it filed an amended verified notice. Accordingly, October 19, 2012, will be considered the filing date of the verified notice.

milepost 0.0 in McAlester to the end of the track at milepost 7.04 in Krebs, a distance of approximately 7.04 miles, both lines in Pittsburg County, Okla.<sup>2</sup> AOK will continue to operate the lines as part of its existing rail line between McAlester and Howe, Okla.

Pursuant to 49 CFR 1150.43(h), AOK states that, although the Agreement contains no direct restrictions on interchange, the lease fee is based upon the percentage of traffic AOK interchanges with UP. AOK states that this arrangement is unchanged from the original lease agreement covering the lines.<sup>3</sup>

AOK certifies that its projected annual revenues as a result of this transaction will not exceed those that would qualify it as a Class III rail carrier and will not exceed \$5 million.

AOK states that consummation of the transaction will occur on or about November 19, 2012. The earliest the transaction can be consummated is November 18, 2012, the effective date of the exemption (30 days after the verified notice was filed).

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Stay petitions must be filed no later than November 9, 2012 (at least seven days before the exemption becomes effective).

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<sup>2</sup> AOK previously obtained an exemption in 1997 to lease and operate the rail lines. See Arkansas-Oklahoma R.R.—Trackage Rights Exemption—Union Pac. R.R., FD 33440 (STB served Aug. 15, 1997).

<sup>3</sup> Concurrently with its verified notice of exemption, AOK has filed under seal, pursuant to 49 CFR 1150.43(h)(1)(ii), a confidential, complete version of the Agreement.

An original and 10 copies of all pleadings, referring to Docket No. FD 35667, must be filed with the Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001. In addition, one copy of each pleading must be served on Daniel A. LaKemper, General Counsel, Arkansas-Oklahoma Railroad, Inc., P.O. Box 185, Morton, IL 61550.

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It is ordered:

1. The delegation of authority to the Director of the Office of Proceedings under 49 CFR 1011.7(a)(2)(x)(A) to determine whether to issue a notice of exemption in this proceeding is revoked.
2. Notice of the exemption will be published in the Federal Register on November 2, 2012.
3. This decision is effective on the date of service.

Decided: October 29, 2012.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman. Vice Chairman Mulvey dissented with a separate expression.

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VICE CHAIRMAN MULVEY, dissenting:

According to AOK's notice, AOK has been leasing a line of railroad from UP since 1997 under an agreement that gives AOK a financial incentive to interchange its

traffic with UP, rather than with Kansas City Southern (KCS). The shippers whose traffic was subject to the interchange commitment contained in the 1997 lease may or may not have been aware of it, given that the notice authorizing that lease made no mention of the presence of a special lease fee arrangement. See Arkansas-Oklahoma R.R.—Trackage Rights Exemption—Union Pac. R.R., FD 33440 (STB served Aug. 15, 1997). Since that 1997 notice was filed, the Board has changed its rules to require the public disclosure of interchange commitments and the filing of a complete version of the agreement with the Board (under seal). See 49 CFR 1150.43.<sup>1</sup>

In support of its desire to continue a lease credit arrangement encouraging interchange with UP rather than KCS – one that has already been in place for more than 15 years – AOK argues that the interchange commitment does not materially change its interchange practices. That argument, of course, begs the question as to why such a provision is necessary at all. Presumably, sophisticated rail carriers such as AOK and UP would not include superfluous provisions in their lease. I am troubled by this disconnect as well by the lack of information the Board has regarding the interchange commitment's impact on competition and shippers. Accordingly, I believe that the Board should have rejected this notice as inappropriate for the notice of exemption process.

On November 1, 2012, the Board announced that it was proposing new rules to require carriers to disclose more information when proposing transactions, such as this

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<sup>1</sup> I note that AOK's initial notice did not contain the information required under the Board's current rules. AOK subsequently amended its notice.

one, that contain an interchange commitment. See Information Required in Notices & Petitions Containing Interchange Commitments, EP 714 (STB served Nov. 1, 2012).

While the comments in Docket No. EP 714 will come too late to inform the Board's actions here, I encourage both rail carriers and shippers to assist the Board in crafting a regime that provides appropriate scrutiny to these types of transactions.

Jeffrey Herzig

Clearance Clerk

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